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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/772,509	02/05/2004	Mark Temple	MT001	5674
33900	7590	05/15/2006	EXAMINER	
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, PC			CONLEY, FREDRICK C	
100 NORTH BROADWAY			ART UNIT	
SUITE 1700			PAPER NUMBER	
OKLAHOMA CITY, OK 73102-8820			3673	

DATE MAILED: 05/15/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action  
Before the Filing of an Appeal Brief**

Application No.

10/772,509

Applicant(s)

TEMPLE, MARK

Examiner

FREDRICK C. CONLEY

Art Unit

3673

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 01 May 2006 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.  
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).


4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: \_\_\_\_\_.  
Claim(s) objected to: \_\_\_\_\_.  
Claim(s) rejected: 1-13.  
Claim(s) withdrawn from consideration: \_\_\_\_\_.

**AFFIDAVIT OR OTHER EVIDENCE**

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: see attachment.  
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). \_\_\_\_\_.  
13. ☐ Other: \_\_\_\_\_.

  
**JJ Swann**  
Supervisory Patent Examiner  
Technology Center 3600

Continuation of 3. NOTE: In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Tarquinio clearly teaches a supportive upper body constraint device comprising a top layer with a first indentation load deflection rating, a second layer with a second indentation load deflection rating, and a base with a third indentation load deflection rating wherein the third ILD is greater than the second ILD, and the second ILD is greater than the first (col. 1 lines 15-27). Therefore, the top cover layer of Tarquinio has an ILD ratio less than the base as claimed by the Applicant. Tarquinio merely fails to disclose the base having an ILD ratio that is greater than 40. It is well known in the art that to merely change a range of values for a structural element, such as the ILD ratio of the base, is considered an obvious modification. Robinson, however, explicitly states a mattress having a base with an ILD ratio in the range of 24-50 (col. 3 lines 17-18). Therefore, the Examiner has provided a citation for the modification of Tarquinio. As stated previously, Both Tarquinio and Robinson disclose mattresses comprised of multiple layers of foam with different ILD ratios. The combination as a whole would suggest to one having ordinary skill to modify the base of Tarquinio to have an ILD ratio within the range that is greater than 40, as suggested by Robinson, wherein the base ILD ratio is greater than the top cover in order to provide firm support for the base of Tarquinio. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). As stated above, it is well known in the art that to merely change a range of values for a structural element, such as the ILD ratio for the base layer, is considered an obvious modification and Tarquinio clearly teaches a supportive upper body constraint device wherein the base layer has an ILD greater than the ILD ratio of the top cover layer (col. 1 lines 15-27). The Applicant's assertion that further resolution is needed for appeal is not well founded since Robinson explicitly states a mattress having a base with an ILD in the range of 24-50, and one having ordinary skill in the art would not have found it novel to merely select an ILD for the base of Tarquinio that is greater than 40 in light of the teachings of Robinson wherein the range of the ILD can extend between 40 to 50. In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Walpin discloses a supportive upper body constraint device comprising a base 22 and a cover 30 on the base. Walpin fails to disclose the cover having an ILD ratio less than the base. Robinson discloses a cushion having a cover 12 with an ILD ratio less than a base 11 (col. 2 lines 19-23) and a cover 12 with an elastomeric foam material with an ILD ratio less than about 14 (col. 3 lines 39-40). As stated previously, Walpin and Robinson disclosing mattresses comprised of multiple layers of foam the combination as a whole would suggest to one having ordinary skill to modify the base of Walpin to have an ILD ratio within the range that is greater than 40 and the cover having an elastomeric foam less than 14 in order to provide minimum body pressure to an occupant lying upon the mattress. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. Walpin discloses a supportive upper body constraint device comprising a base 22 and a cover 30 on the base. Tarquinio discloses cushion having a cover 20 with a portion of a surface between support members (26,28) comprising a visco-elastic foam material. It is widely known to employ a variety of different materials based on an individual's needs and the combination as a whole would have suggested employing visco-elastic foam material as taught by Tarquinio in the cover of Walpin in order to provide reduced compression of the mattress when a weight is placed on the upper surface of the cushion. Once again the Applicant's assertion that further resolution is needed for appeal is not well founded since Robinson explicitly states a cushion having a cover 12 with an ILD ratio less than a base 11 (col. 2 lines 19-23) and a cover 12 with an elastomeric foam material with an ILD ratio less than about 14 (col. 3 lines 39-40), and one having ordinary skill in the art would not have found it novel to merely modify the base of Walpin to have an ILD ratio within the range that is greater than 40 and the cover having an elastomeric foam less than 14 in order to provide minimum body pressure to an occupant lying upon the mattress. In conclusion the Applicant relies on broad structural language that clearly fails to distinguish the Applicant's invention and does not preclude the Examiner from interpreting the prior art of record as stated above.